WAN SALIMAH WAN JAFFAR

v.

MAHMOOD OMAR; ANIM ABDUL AZIZ (INTERVENER)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-144-1993]
11 APRIL 1997

LAND LAW: *Lease - Rights of lessee - Non-registration of lease - Whether agreement enforceable - Whether tenancy existed - Whether equitable relief available - National Land Code 1950, ss. 206(3) & 221(4)*

LAND LAW: *Sale of land - Vendor not in possession - Whether purchaser took land subject to interest of tenant*

CONTRACT: *Non est factum - Whether doctrine acceptable without allegation of fraud - Whether could succeed on ground that contents of agreement not explained - When could doctrine be raised*

EVIDENCE: *Adverse inference - Maker of agreement not called - Whether presumption arose - Whether agreement could be taken as true - Evidence Act 1950, s. 32(b)*

EVIDENCE: *Presumption - Adverse inference - Intervener chose not to give evidence - Whether presumption arose - Power of attorney from intervener - Whether valid - Whether with power of attorney representative competent to give evidence*

The plaintiff and the defendant had signed an agreement whereby the latter agreed to lease his share of certain undivided lots of land ('the said land') in Pulau Sibu to the plaintiff for a period of 15 years. The lease was however not registered at the land office and attempts to get the defendant to complete the instrument in Form 15A were unsuccessful. An action was instituted against the defendant and the suit was joined by an intervener. The defendant had not entered a defence but at the trial the defence of *non est factum* was raised. The intervener did not attend court but sent her representative instead, authorising him to seek to have the defendant's shares in the land transferred to her. The issues before the court were: (i) whether the defendant could raise the doctrine of *non est factum*; (ii) whether an unregistered lease is enforceable; (iii) whether the intervener was a *bona fide* purchaser; and (iv) whether the representative could testify in lieu of the intervener.

Held:

[1] The defence of *non est factum* may be raised by one who cannot read, whether through sheer blindness or actual illiteracy, in regard to a claim, based on a promise made under seal. It was the basis of a defence that the signatory was mistaken as to the nature of the transaction. Now, a man is estopped by his signature, from denying that he is not bound by his consent to the provisions contained in a deed, unless his signature is shown to be obtained by fraud or misrepresentation, or that the signatory signs it with a genuine mistake so that his mind has not gone with his action.

[1a] In the case before the court, the plaintiff and the defendant had signed the contract, knowing it to be a contract, and the evidence disclosed that the defendant was conscious of why he signed the written agreement. There was, additionally, no allegation of fraud and the contents of the agreement were explained to the defendant by the husband of the plaintiff. Thus, the defence of *non est factum* could not succeed.

[1b] The agreement was prepared by the witness of the signatories of the agreement and although he could not be found to testify, the court presumed that what the witness did was in the ordinary course of business and had done so with no interest or motive. Therefore, the agreement could be taken to be true and was admitted under the Evidence Act 1950, s. 32(b).

[2] Under the National Land Code 1965 ('the NLC'), a statutory legal lease is created when the lease in statutory form has been registered. Section 221(4) of the NLC enacts that every such lease shall be granted by an instrument in Form 15A. Where the lease relates to a part only of any alienated land, there shall be attached to the instrument a plan and description sufficient to enable the plaintiff to be accurately identified.

[2a] Section 206(3) of the NLC provides that nothing in sub-s. (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein. The written agreement between the parties, though void at law as a lease because of non-registration, was in equity a good and enforceable agreement. Thus, a liberal approach of the equitable relief was taken within the terms of s. 206(3) of the NLC and construed in favour of the plaintiff. As the agreement had been partly executed by possession, the equitable remedy of specific performance would be an appropriate remedy.

[3] An entry by a lessee under an unregistered lease will create a relationship of landlord and tenant, establishing a tenancy at will. Such a tenancy can be converted upon payment of the rent reserved, into a periodic tenancy, whether yearly, monthly or weekly tenancy, depending on the mode of payment of the rent. The plaintiff in the instant case, would have a remedy against the defendant and although the agreement was not a proper instrument for registration as a lease, it could be treated as an agreement for a lease.

[3a] A purchaser with notice that the vendor is not in possession of the land takes subject to the right or interest of a tenant in possession, notwithstanding the fact that the tenant may have entered into an unregistered lease with the defendant.

[3b] The intervener had notice that the vendor defendant was not in possession of the land and since the lessee plaintiff built two buildings on the land, she can be said to be a tenant in possession, even though she had entered into an unregistered lease with the defendant.

[4] A power of attorney is an instrument allowing the donor of the power to formally authorise the donee of the power to act as his agent by deed. A power of attorney must be created in the form as stated in s. 3(1)(a) of the Powers of Attorney Act 1949 ('the PA'). The PA under which the representative of the intervener acted was null and void, as it was not in accordance with the format as set out in the 1st schedule to the PA. Thus, the representative of the intervener was not empowered to give evidence on behalf of the intervener. As the intervener chose not to give evidence, it raised a presumption against her.

[Judgment to plaintiff.]

Cases referred to:

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639 ***(refd)***

Alagappa Chetty v. Ng Guan Yin 5 FMSLR 236 ***(refd)***

Attwood v. Munnings [1827] 7 B & C 278 ***(cit)***

Avon Finance Co Ltd v. Bridger [1985] 2 All ER 281 CA ***(refd)***

Bachan Singh v. Mahinder Kaur & Ors [1956] 22 MLJ 97 ***(refd)***

Bank Negara Indonesia v. Philip Hoalim [1973] 2 MLJ 3 ***(refd)***

Bank of Ireland v. M'Manamy [1916] 2 IR 161 ***(cit)***

Beh Lee Liang v. Chew Sah Suak @ Chew Sar San & Anor [1996] 1 CLJ 173 ***(refd)***

Birmingham and District Land Co v. London and North Western Railway [1888] 40 Ch D 268 ***(cit)***

Bryant, Powis and Bryant, Ltd v. La Banque du Peuple [1893] AC 170 ***(cit)***

Carl Zeiss Stiftung v. Rayner & Keeler Ltd [1970] Ch 506 ***(cit)***

Curtis v. Chemical Cleaning and Dyeing Co Ltd [1951] 1 All ER 631 ***(refd)***
DA Duncan v. PP [1980] 2 MLJ 195 FC ***(refd)***
Danby v. Coutts & Co [1885] 29 Ch D 500 ***(cit)***
Durga v. Mathura 15 CWN 717 ***(cit)***
El Dev Co v. AG for Ontario [1919] AC 687 ***(cit)***
Esdaile v. La Nauze [1835] 1 Y & C ex 394 ***(cit)***
Foster v. Mackinnon [1869] LR CP 704 ***(cit)***
Gallie v. Lee (sub nom Saunders v. Anglia Building Society [1971] AC 1004 HL ***(refd)***
Goodson v. Grierson [1908] 1 KB 766 ***(cit)***
Gurbakhsh v. Gurdial A [1927] PC 230 ***(foll)***
Harper v. Godsell [1870] LR 5 QB 422 ***(cit)***
Hasham v. Zenab [1960] AC 316 ***(cit)***
Hj Abdul Rahman v. Mohamed Hassan [1917] AC 209 ***(refd)***
Howard v. Baillie [1796] 2 Hy B1 618 ***(cit)***
Ideal Films, Ltd v. Richards [1927] 1 KB 374 ***(cit)***
In re Fireproof Doors Ltd, Umney v. The Company [1916] 2 Ch 142 ***(refd)***
Inter-Continental Mining Co Sdn Bhd v. Societe des Etains de Bayas Tudjuh [1974] 1 MLJ 145 ***(refd)***
Inwards v. Baker [1965] 2 QB 29 ***(cit)***
Ismail bin Savoosah & Ors v. Hajee Ismail [1889] 4 Ky 453 ***(refd)***
Ives (ER) Investments Ltd v. High [1967] 1 All ER 504 ***(cit)***
Jacobs v. Morris [1902] 1 Ch 816 CA ***(cit)***
Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116 ***(refd)***
Krakauer v. Kate [1954] 1 WLR 278 CA ***(cit)***
L' Estrange v. F Graucob Ltd [1934] 2 KB 394 ***(refd)***
Lady Naas v. Westminster Bank Ltd [1940] AC 366 ***(cit)***
Lee Ah Low v. Cheong Lep Keen & Anor [1970] 1 MLJ 7 ***(refd)***
Lewis v. Ramsdale [1886] 55 LT 179 ***(cit)***
Liew Ah Hock v. Malayan Railway [1967] 1 MLJ 53 ***(refd)***
Lin Nyuk Chan v. Wong Sz Tsin [1964] MLJ 200 ***(refd)***
Logan v. Bank of Scotland (No 2) [1906] 1 KB 141 ***(cit)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 2 CLJ 713 ***(refd)***
Margaret Chua v. Ho Swee Kiew & Ors [1961] 1 MLJ 173 ***(foll)***
Martin v. Smith LR 9 Ex 50 ***(refd)***
Montgomery v. Foy [1895] 2 QB 321 ***(cit)***
Muthiah v. Lee Kor Fan [1966] 1 MLJ 105 ***(refd)***
Norbury v. Griffiths [1918] 2 KB 369 CA ***(cit)***
Norwich & Peterborough Building Society v. Steed (No 2) [1993] 1 All ER 330 ***(refd)***
O'Connor Real Estate Ltd v. Flynn [1969] 3 DLR (3 ed) 345 (NS) ***(refd)***
Oertel v. Hordern [1902] 2 SR (NSW) (Eq) 37 ***(cit)***
Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok [1977] 1 MLJ 124 ***(cit)***
Parker v. Taswell 2 D & G & J 559 ***(refd)***
Performing Right Society v. London Theatre of Varieties [1924] AC 1 ***(cit)***
Perry v. Holl [1860] 2 De GF & J 38 ***(cit)***
Plimmer v. Wellington Corporation [1884] 9 App Cas 699 ***(cit)***
Ramsden v. Dyson [1866] LR 1 HL 129 ***(cit)***

Re Farbenindustrie [1944] Ch 41 CA ***(refd)***
Re Wallace, ex p Wallace [1884] 14 QBD 22 ***(cit)***
Rooke v. Kensington (Lord) [1856] 2 K & J 753 ***(cit)***
Salaman v. Secretary of State for India [1906] 1 KB 613 ***(cit)***
Sanders Lead Co Inc v. Entores Metal Brokers Ltd [1984] 1 All ER 857 ***(refd)***
Settlement Corporation v. Hochschild (No. 2) [1969] 1 WLR 1664 ***(cit)***
Siew Soon Wah & Ors v. Yong Tong Hong [1973] 1 MLJ 133 ***(cit)***
Steadman v. Steadman [1974] 2 All ER 977 ***(cit)***
Thoroughgood's Case [1584] 2 Co Rep 92 ***(cit)***
Tidey v. Mollett [1864] 16 CB (NS) 298 ***(refd)***
Travinto Nominees Pty Ltd v. Vlattas [1973] 47 ALJR 279 ***(cit)***
Walsh v. Lonsdale [1882] 21 Ch D 9 ***(refd)***
Wilkins v. Kannammal [1951] MLJ 99 ***(refd)***
Williamson v. Rover Cycle [1901] 2 IR 619 ***(cit)***
Withington v. Herring [1829] 5 Bing 442 ***(cit)***
Woo Yok Wan v. Loo Pek Chee [1975] 1 MLJ 156 ***(refd)***
Yong Tong Hong v. Siew Soon Wah [1971] 2 MLJ 105 ***(cit)***
Zimbler v. Abrahams [1903] 1 KB 577 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 32(b)
National Land Code 1965, ss. 206(1), (3), 221(1), (3)(b), (4), 309, 310, 311, 342(2), 343(1)(a), (1)(b), 417(1)
Powers of Attorney Act 1949, ss. 3(1)(a), 4(1)(a), 5, 10
Rules of the High Court 1980, O. 15 r. 6(2)(b)(ii), O. 16 r. 5, O. 18 rr. 2(1), 14(2), 19, 22, O. 19 r. 7(1), (3), O. 25 r. 1(1), O. 28 r. 8(1), O. 92 r. 4

For the plaintiff - Wan Azura Wan Fadzir; M/s Nijar, Kumar, Netto & Partners
For the defendant - Awtar Singh, M/s A Singh & Partners
For the intervener - Mohd Nashir Hussin; M/s Nashir, Johal & Co

JUDGMENT

Abdul Malik Ishak J:

The defendant did not file his statement of defence even though he was served with the writ of summons together with the statement of claim indorsed therein on 17 May 1993 at 3.30pm. An affidavit of service in encl. 8 clearly shows that service of the writ with the statement of claim was indeed served on the defendant. A memorandum of appearance dated 22 May 1993 and filed by Tetuan Kadir & Co. on 24 May 1993 in encl. 10 shows that the defendant intends to defend the action and this brings into sharp focus O. 18 r. 2(1) of the Rules of the High Court 1980 ('RHC') which reads as follows:

> Subject to para. (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

This rule clearly provides that the defendant who enters an appearance and intends to defend must serve a defence; it recognises beyond doubt that the plaintiff must first have served his statement of claim. The effect of this rule can simply be stated as follows: The defendant must serve his defence within the 14 days after the time limited for appearance or after the statement of claim is served on him, whichever is the later. Thus, it is correct to say that a defence is served by virtue of the rule as set out in the RHC and not by an order from the court.

Here, the defendant failed to file his statement of defence and he runs foul of O. 18 r. 2(1) of the RHC.

Since the defendant failed to serve a defence on the plaintiff, the latter has the right to apply to the court for judgment and on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on her statement of claim (O. 19 r. 7(1) of the RHC). It must not be forgotten that this rule applies in the context of the plaintiff and the defendant and not to third party proceedings (O. 16 r. 5 of the RHC). The default in serving a defence by the defendant cannot be followed by judgment without an order for the simple reason that the plaintiff must apply for judgment by summons or motion (O. 19 r. 7(3) of the RHC). Unfortunately, the plaintiff was not properly advised and there was therefore no application by summons or motion to obtain judgment in default of defence.

By a summons in chambers in encl. 12, which was dated 20 July 1993, the intervener sought to intervene and she affirmed an affidavit on 11 June 1993 as reflected in encl. 13. In that affidavit she adverted to the affidavit of Harun bin Hj. Faudzar (SPP1) ('Harun') who was said to have been authorised by her to affirm an affidavit on her behalf in support of encl. 12. In due course the judge in chambers allowed the intervener to intervene and an order to that effect was extracted on 11 August 1993 as reflected in encl. 27. The intervener must have intervened under O. 15 r. 6(2)(b)(ii) of the RHC which states that:

> 6(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application:-
>
> (b) order any of the following persons to be added as a party, namely:-

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

It is of importance to remember that it is always a necessity to have before the courts the proper and necessary parties for the determination of any point in issue (*Norbury v. Griffiths* [1918] 2 KB 369 CA; and *Performing Right Society v. London Theatre of Varieties* [1924] AC 1). But the court has the final say and retains a discretionary power to refuse the order (*Roberts v. Holland* [1893] 1 QB 665). Speaking generally and from experience, the court will make all such changes in respect of parties as may be necessary in order to arrive at an effectual adjudication of all the matters in dispute (*Montgomery v. Foy* [1895] 2 QB 321; and *Ideal Films, Ltd v. Richards* [1927] 1 KB 374). In my judgment, the scope of O. 15 r. 6(2)(b)(ii) of the RHC is now thrown wider and, consequently, one must be careful when applying the case of *Settlement Corporation v. Hochschild* (No: 2) [1969] 1 WLR 1664; [1970] 1 All ER 60). It is a correct statement of the law to say that a person without legal but only a commercial interest cannot be allowed to intervene (*Re Farbenindustrie* [1944] Ch. 41 CA). In the same vein Kerr LJ said in *Sanders Lead Co. Inc. v. Entores Metal Brokers Ltd* [1984] 1 All ER 857 to this effect:

> In my view the rule requires some interest in the would-be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action is not enough. It may be impossible, and would in any event be undesirable, to attempt to categorise the situations in which the interests of the would-be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that there must be some direct interest in the subject matter, such as an alleged infrigement of a patent, trade mark or copy right with which the intervener is concerned.

So much for the law of intervention. Having successfully intervened, the intervener did not do anything positive in dealing with the statement of claim as filed by the plaintiff. The intervener went into deep slumber.

This was not a case under O. 18 r. 22 of the RHC where either party may, after the defendant has entered an appearance apply to the court for an order that the action be tried without pleadings. This was a case where the pleadings

were not in order and the solicitors involved had the audacity to say otherwise. This was not a case like that of *Beh Lee Liang v. Chew Sah Suak @ Chew Sar San & Anor* [1996] 1 CLJ 173 where O. 28 r. 8(1) of the RHC was invoked to construe proceedings begun by originating summonses to be continued as if begun by writ by taking into account affidavits and take them as they stand as pleadings. This was a case that begun by writ but at the close of the pleadings the parties were not cognizant of the issues in dispute and were not in a position to prepare their evidence for trial. In two respects, closure of pleadings are vital. Firstly, it operates under O. 18 r. 14(2)(a) of the RHC to create an implied joinder of issue on the pleading last served. Secondly, under O. 25 r. 1(1) of the RHC it enables the plaintiff to take out a summons for directions. Be that as it may, I had to resort to O. 92 r. 4 of the RHC and by invoking my inherent powers made orders, as it was necessary to prevent injustice or to prevent an abuse of the process of the court, that encls. 2, 4, 6, 13, 14, 18, 20, 27, 29, 32 and 43 to stand as pleadings. The inherent powers of the courts have been exercised and brought to bear on the parties in many instances. Thus, the court has the inherent jurisdiction to stay an action which must necessarily fail where the action was focussed against an act of State (*Salaman v. Secretary of State for India* [1906] 1 KB 613); or an action brought within the jurisdiction in respect of a cause of action which arose out of the jurisdiction would be stayed by the court when it was satisfied that no injustice will be done to the plaintiff on the one hand and the defendant too would not be subject to such injustice in defending the action if the defendant was sued in the country where the cause of action arose (*Logan v. Bank of Scotland (No: 2)* [1906] 1 KB 141). The court too has the jurisdiction to strike out an action for want of prosecution when the action was delayed for 12 years (*Krakauer v. Kate* [1954] 1 WLR 278 CA). The court too would strike out a pleading under O. 18 r. 19 of the RHC and under its inherent jurisdiction as soon as a cause of action estoppel was brought to its attention like what transpired in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd* [1970] Ch. 506. At the end of the day, the jurisdiction of the court will not be exercised except solely with great circumspection and unless it is perfectly clear that the plea cannot succeed (*Goodson v. Grierson* [1908] 1 KB 766; *El. Dev. Co v. A.G. for Ontario* [1919] AC 687).

Now to the trial proper.

In the course of the trial the following brief facts emerged. The plaintiff (SP1) entered into a written agreement on 28 November 1990 with the defendant (SD1) where the latter agreed to lease his 21/48 shares of LO 67, LO 68 and LO 69 comprised in H.S.M. 44, H.S.M. 45 and H.S.M. 46 respectively, in the Mukim of Pulau Sibu, Johor to the plaintiff for a period of 15 years at RM1,800 per year rental. This written agreement (P1) was duly signed by the

plaintiff and witnessed by Khamis. The defendant too signed the written agreement (P1) and it was witnessed by the plaintiff's husband one Syed Shaikh bin Syed Mohamed (SP2 – "Syed Shaikh"). Immediately after that written agreement (P1) was signed, Syed Shaikh handed RM1,800 to the defendant and this was witnessed by the plaintiff herself though no receipt was issued for this purpose. Syed Shaikh too built two houses as seen in photographs P4A to P4I after the written agreement (P1) was signed. The defendant put up the defence that he was a fisherman in 1990 and only attended religious school. Consequently, it was the defendant's stand that he was unable to read and write Bahasa Malaysia in rumi script. In the same breath, the defendant did say that he could read and write a little of the rumi script. It was the defendant's stand too that he was unable to read the written agreement (P1). The defendant too put up the defence that the written agreement (P1) was in relation to a loan of RM1,000.

The intervener did not take the stand. The intervener's representative who said that he held a Power of Attorney from the intervener came to court and testified. The intervener's representative by the name of Harun testified that before the intervener signed the sale and purchase agreements in PP13, PP14 and PP15 in relation to LO 68 and LO 67 he visited Pulau Sibu and there he saw two buildings as reflected in photographs P4A to P4I. Harun testified that he was not able to ascertain on which portion of the land the two buildings were built upon. Harun further testified that LO 67, LO 68 and LO 69 have now being registered in the name of the intervener. This however excluded the defendant's shares which still remained in his name and it is these shares that the intervener now sought to be transferred to her.

Certain salient issues surfaced from these brief recital of the facts. I now propose to examine these salient issues not in its order of merit.

Non Est Factum And Other Related Issues

It is trite law that when a party signs a contract knowing it to be a contract which governs the relations between them, like the present case, then, to use the words of Denning J (as he then was) in *Curtis v. Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 "his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation". Way back in 1934, Scrutton LJ said in *L'Estrange v. F. Graucob Ltd* [1934] 2 KB 394 that:

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

It must be stressed that in the present case there was no allegation of fraud but there was an allegation that the written agreement (P1) had not been explained to the defendant. The defendant affirmed an affidavit-in-reply on 31 July 1993 as reflected in encl. 18 and there at para. 3 he deposed the following:

> Saya menyatakan bahawa walaupun saya telah menandatangani perjanjian tersebut tetapi saya tidak faham isi kandungannya kerana saya seorang yang buta huruf. Saya juga tidak difahamkan isi kandungan perjanjian tersebut dan semasa saya menandatangani perjanjian tersebut tiada orang yang menyaksikannya melainkan suami plaintiff.

On the question of illiteracy, the defendant in his evidence particularly in examination-in-chief said that:

> Pada 1990 saya bekerja sebagai nelayan. Saya bersekolah Agama sahaja. Saya tidak boleh tulis dan baca Bahasa Malaysia di dalam bentuk rumi. Saya boleh baca dan tulis rumi sedikit sahaja.

Thus, it was not entirely true that the defendant was an illiterate. The defendant on his own admission categorically stated that he was able to read and write rumi script but to a lower degree only. The words "sedikit sahaja" would import subjectiveness.

Again under examination-in-chief the defendant said:

> Semasa saya tandatangan perjanjian ini (P1) saya tidak di terangkan apa maksud perjanjian ini.

Surprisingly under cross-examination the defendant testified that:

> Bila saya sign (P1) saya tidak tahu apa-apa. Saya sign (P1) sebab saya pinjam duit. Isi kandungan (P1) saya tidak tahu. Sekarang saya kata bahawa saya tahu bila saya tandatangan (P1) ianya bertujuan memajak tanah arwah bapa saya. Saya pun tahu isi kandungan (P1).

Again, under cross-examination the defendant testified:

> Semasa saya di beri (P1) saya tidak suruh sesiapa baca nya. SP2 suruh saya sign di (P1) dan dia tunjuk tempat dimana saya perlu sign.
>
> Saya setuju saya boleh faham dan baca Bahasa Malaysia di dalam rumi. Tetapi tidak begitu lancar.
>
> Saya ingat saya yang tandatangan dulu di (P1) sebelum orang lain sign nya. Selepas saya sign (P1) itu sahaja. (P1) tidak diberi kepada saya. Lepas sign terus saya balik. Saya nampak SP1 isteri Syed Shaikh tandatangan (P1). Saya pun melihat Syed Shaikh dan Khamis tandatangan (P1).

Under cross-examination, the defendant was asked:

Put: (1) Awak faham bila awak tandatangan (P1) yang awak telah menyewakan tanah kepada plaintif.

(2) Awak pun telah diterangkan isi kandungan (P1) oleh Syed Shaikh sebelum awak tandatangan (P1).

Jawapan: Saya setuju. Saya tahu tujuan (P1) Y.A.

It is of interest to note that Syed Shaikh did say in examination-in-chief that he personally explained the contents of the written agreement (P1) to the defendant who categorically stated that he understood its contents. Syed Shaikh's evidence merits reproduction:

> P1 di masuki oleh isteri saya – Wan Salimah dengan Mahmood bin Omar untuk memajak 21/48 bahgian di Lot 67, Lot 68, Lot 69 Pulau Sibu, Mersing. Saya ada menerangkan isi kandungan (P1) kepada defendan dan defendan kata dia faham dan tahu bahawa (P1) untuk memajak tanah dia selama 15 tahun. Pada saya defendan boleh baca (P1).

That Syed Shaikh had explained the contents of the written agreement (P1) to the defendant was amply corroborated by the plaintiff. She testified under examination-in-chief to this effect:

> Suami saya pun menerangkan isi kandungan (P1) kepada defendan dan defendan kata dia faham.

The answers of the defendant under cross-examination together with the evidence of Syed Shaikh clearly demolished the defendant's assertions that he was an illiterate, unable to read nor write rumi script, was not explained the contents of (P1) and did not understand the contents of the written agreement (P1). The defendant was definitely an intelligent individual and not a moron as his counsel portrayed and wanted him to be. The defendant himself knew the contents of the written agreement (P1) and that it was a lease agreement of his late father's land. I would go so far to say that even if the defendant was not explained the contents of the written agreement (P1) as he knew not how to read the Bahasa Malaysia in the rumi script (the evidence as I said showed that he could read and write the Bahasa Malaysia in rumi script and he in fact understood the contents of the written agreement (P1)) that would not be fatal. I am fortified in my view by a passage that appeared in the judgment of Wood Acting CJ in *Ismail bin Savoosah & Ors v. Hajee Ismail* [1889] 4 Ky 453, 458 to the following effect:

> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of

contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained.

This brings me to the defence of *non est factum* (it is not his deed). This defence would normally be raised by one who could not read whether through sheer blindness or actual illiteracy in regard to a claim based on a promise made under seal (*Thoroughgood's* case [1584] 2 Co. Rep. 92; and *Lady Naas v. Westminster Bank Ltd* [1940] AC 366 at 374, 375; [1940] All ER 485 at 488, 489, HL). It is the basis of the defence that the signatory is mistaken as to the nature of the transaction. But the law has developed rapidly and the implications are wide and far reaching. As the law developed in tandem with the global modernisation the defence of this nature was further weakened. Thus, a man is now estopped by his signature from denying from being bound by his consent to the provisions contained in a deed (*Lady Naas v. Westminster Bank Ltd (supra)*) or in an agreement as reflected in *O'Connor Real Estate Ltd v. Flynn* [1969] 3 DLR (3 ed) 345 (NS). My research shows that the defence of *non est factum* has been successfully pleaded where fraud was proved to the hilt (*Foster v. Mackinnon* [1869] LR 4 CP 704 at 711 per Byles J; *Bank of Ireland v. M'Manamy* [1916] 2 IR 161; by way of a comparison reference should be made to the wellknown case of *Hasham v. Zenab* [1960] AC 316 at 335 PC, per Lord Tucker). In the present case before me fraud was not alleged and neither was there evidence of fraud. Byles J in *Foster v. Mackinnon (supra)* held the view that where a signatory to a document signs it under a genuine mistake as to its nature he is not bound by the terms of it because his mind has not gone with his action, and *a fortiori* the same reasoning applies when he is deceived into signing it by a false representation as to its nature. The evidence disclosed in the present case showed that the defendant was conscious and knew why he signed the written agreement (P1). The defendant knew the nature of the written agreement (P1) and his mind was attuned to his action when he signed that agreement. There was not an iota of evidence to show that the plaintiff or Syed Shaikh had falsely represented the nature and contents of the written agreement (P1) to the defendant.

It would appear that where it is not possible to rely on misrepresentation or mistake, the plea of *non est factum* would be resorted to as a last resort. Thus, a successful plea renders the contract void so that a third party cannot acquire a good title under it. However, as innocent third parties may have relied to their detriment upon the signature as being binding the plea has been narrowly construed. In *Gallie v. Lee* (s*ub nom Saunders v. Anglia Building Society* [1971] AC 1004 HL, the plea was rejected on the following facts. There an

elderly widow of 78 had a leasehold interest in a house. She knew her nephew wished to raise money on the house and that his business associate, Lee, was to assist him in obtaining this. The widow wanted to be sure that she could live in the house for the rest of her life. Lee asked her to sign a document, but she had broken her spectacles and could not read it. She asked what the document was and signed it when Lee told her that is was a deed of gift of the house to her nephew. In fact it was an assignment of the house to Lee for 3,000 pound. Lee mortgaged the house for 2,000 pound to the building society (the innocent third party). When Lee defaulted on the mortgage instalments the building society sought possession of the house. The widow pleaded *non est factum* and asked for a declaration against the building society that the assignment was void, Lord Reid had this to say:

> The plea of *non est factum* obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply to certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.
>
> But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not think he can be heard to say that he signed in reliance on someone he trusted. But particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.

> The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case ... .
>
> Finally, there is the question as to what extent or in what way must there be a difference between that which in fact he signed and that which he believed he was signing. In an endeavour to keep the plea within bounds there have been many attempts to lay down a dividing line ... .
>
> There must, I think, be a radical difference between what he signed and what he thought he was signing – or one could use the words 'fundamental' or 'serious' or 'very substantial.' But what amounts to a radical difference will depend on all the circumstances. If he thinks he is giving property to A whereas the document gives it to B, the difference may often be of vital importance, but in the circumstances of the present case I do not think that it is. I think that it must be left to the courts to determine in each case in light of all the facts whether there was or was not a sufficiently great difference. The plea non est factum is in a sense illogical when applied to a case where the man in fact signed the deed. But is none the worse for that if applied in a reasonable way.

In *Avon Finance Co. Ltd v. Bridger* [1985] 2 All ER 281 CA, the facts there were that the defendants, an elderly couple, purchased a house for their retirement for 9,275 pound, the arrangements being conducted by their son. The son was to contribute 2,500 pound to the purchase price. Without telling the defendants, the son obtained a loan from the plaintiff finance company on the security of the retirement home. He obtained the defendants' signatures to the charge by telling them that the documents they were signing related to their own mortgage with the building society. The son failed to make the finance payments and the finance company sought possession against the defendants. The defendants pleaded *non est factum*. It was held that such a plea could not operate because the defendants had not exercised reasonable care in entering into the transaction.

In *Norwich & Peterborough Building Society v. Steed (No: 2)* [1993] 1 All ER 330, the appellant, Steed, sought to rely on the plea of *non est factum* on the basis that he had executed a power of attorney in favour of his mother but, as a result of trickery, his mother had then transferred his house to his

sister and her husband who had used the house as security for a loan on which they had defaulted. He alleged that his mother thought she was signing a document concerning her own affairs and did not know that she was signing a transfer of the property. She was therefore mistaken as to the essential character of the document signed. It was held that the plea could not succeed.

Syed Shaikh played a major role in the whole episode. It was Syed Shaikh that discussed with the defendant in regard to the lease of the land. Syed Shaikh's relationship with the defendant went a long way. They were close friends. Syed Shaikh knew the defendant for ten solid years and they were also neighbours. It was with this scenario in mind and the fact that Syed Shaikh had explained the contents of the written agreement (P1) to the defendant that the defence of *non est factum* could not hold water. In the words of Syed Shaikh there was an element of trust that had developed over the years and this had induced Syed Shaikh to believe the defendant. It is my judgment and I so hold that the defence of *non est factum* must fail.

In regard to Khamis, I have no hesitation to believe the plaintiff and Syed Shaikh when they both testified that Khamis signed the written agreement (P1) as a witness. I too believe Syed Shaikh when he testified that he could identify Khamis's signature on the written agreement (P1) and was familiar with Khamis's signature as he had dealings with Khamis before. It was Syed Shaikh's testimony that he tried to contact Khamis at Mersing but it was unsuccessful. Thus, Khamis cannot be found and he has become incapable of giving evidence. Section 32(b) of the Evidence Act 1950 enacts as follows:

> Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases; (b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowlegment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

The best evidence must be produced before the court. As a general rule hearsay evidence is excluded. But if a person is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense what better evidence can be obtained in the circumstances than the statement, be it oral or written, which that person

may have made relating to the relevant fact under inquiry before the occurrence of that person's death or his incapacity. Of course the opportunity to cross-examine would not be available. Having regard however to the character and the subject matter of the statement it is always reasonable to expect the highest degree of truth and the desire to deceive or falsify is almost non-existent. All those cases that fall under this category are regarded and categorised as exceptions to the hearsay rule. Section 32 of the Evidence Act 1950 is an exception to the hearsay rule. In the context of the present case, para. (b) is relevant and highly potent. No evidence was adduced that Khamis was dead. There was evidence through Syed Shaikh that concerted attempts to trace Khamis were fruitless. Khamis cannot be found and thus was incapable of giving evidence. It was apparent in the course of the trial that Khamis's attendance cannot be procured without an amount of delay or expense. In relation to the written agreement (P1) Khamis played a crucial role – he witnessed the signatory of the second party, namely, the plaintiff. What may one ask to be the reason for the admission of a statement or entry or, in the context of the present case, of a document used in commerce signed by Khamis? The answer may be stated to be that it may be presumed that what Khamis did was in the ordinary course of business and done from disinterested motive and thus may be taken as true. After all it was Khamis who prepared (tuliskan) the written agreement (P1). There is no restriction in para. (b) to s. 32 of the Evidence Act 1950 that the entry or the signature should have been made before the dispute arose. What is of pertinence would be that it was made in the course of business. It must be stressed that Khamis cannot be found and sufficient evidence was adduced along that line. The position was the same as in *D.A. Duncan v. PP* [1980] 2 MLJ 195 FC where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said:

> Part of the evidence consisted of a deposition at the Preliminary Enquiry of a witness who could now not be traced. The deposition was admitted over the protest of counsel for the appellant. We are however fully satisfied that sufficient evidence was adduced to justify the Court's admission of the deposition under s. 32 of the Evidence Act.

As I said, there was evidence that Khamis prepared (tuliskan) the written agreement (P1). There was also evidence that Syed Shaikh had dealings with Khamis in the past and as to what these dealings were all about, no evidence was forthcoming. Surely the written agreement (P1) can safely be said to be "a document used in commerce, ... signed by Khamis" as testified by the plaintiff and Syed Shaikh. That must be so and that is my judgment. It is also my judgment that the written agreement (P1) was a damning piece of evidence to show that the defendant had leased his 21/48 shares of LO 67, LO 68 and LO 69 to the plaintiff for 15 years w.e.f. 28 November 1990.

Lease Of 15 Years And Other Related Matters

At common law, upon execution of the deed of the lease a legal estate is automatically created. On perusal of the written agreement (P1) it will be noted that it contained sufficient and appropriate terms executed by the parties to constitute a demise. The written agreement (P1) contained in no uncertain terms the three elements of a lease, namely, certainty as to time, rent payable and the grant of an exclusive possession. There was evidence that the plaintiff and Syed Shaikh took possession by building two buildings and RM1,800 was paid by Syed Shaikh upon signing the written agreement (P1) – these are acts that would enable the plaintiff to seek specific performance. Whether specific performance would be granted is an entirely different issue and it would be dependent on the discretion of the respective judges. MacIntyre J in *Muthiah v. Lee Kor Fan* [1966] 1 MLJ 105 at p. 112 adopted a stringent approach when his Lordship said that specific performance would not be granted as it would "tantamount to exercising my discretion to deprive a lawful owner of property the right to use it to his best advantage." For my part a less stringent approach would be adopted.

Under the National Land Code 1965 ('NLC'), a statutory or legal lease is created when that lease in statutory form has been registered. Section 221(4) of the NLC enacts that every such lease shall be granted by an instrument in Form 15A; and in any case where the lease relates to a part only of any alienated land, there shall be attached to the instrument a plan and description sufficient to enable the part to be accurately identified. In the present case, there was evidence emanating from Syed Shaikh that the defendant was not keen to sign Form 15A as reflected in exh. P3 simply because the defendant felt that it was not necessary as both of them were neighbours and good friends. A recital of the evidence inspires confidence that Syed Shaikh was really keen to comply with the provisions of the NLC. The evidence of Syed Shaikh under examination-in-chief in this regard reads thus:

> Saya telah berurusan untuk daftarkan pajakan ini. Tetapi defendan kata tidak payah lah. Defendan kata kita kawan baik. Perlu percaya di antara satu sama lain. Ini berlaku about one year later. Selepas (P1) di tandatangani, satu tahun kemudian baru saya daftar tanah untuk pajakan di pejabat tanah.
>
> Di (P3) tempoh pajakan bermula pada 28 November 1991 tetapi (P1) bertarikh 28 November 1990 – beza sebab saya kenal defendan selama 10 tahun, ada element of trust, saya percaya kepada defendan, kita neighbours, tak apalah lain kali kok buat, dengan kepercayaan itu saya pun tidak pursue benda ini. Kita pun kawan baik.

Selepas saya serahkan (P3) kepada defendan untuk tandatangan, sebenarnya adik saya yang bawa P3 kepada defendan untuk tandatangan, tetapi dia enggan, dia kata kita sama-sama kenal bukan orang lain. Kita berjiran dan kawan baik, Jadi perkara itu mati di situ sahaja. Keengganan defendan untuk menandatangan (P3) telah di beritahu terus menerus oleh defendan kepada saya. Defendan masih kata tidak perlu sebab kami berdua berjiran dan kawan baik.

Selepas defendan kata demikian, saya biarkan begitu sahaja lah. Saya pun masih bayar pembayaran. Pembayaran itu di bayar in advance.

Since the defendant was not willing to sign (P3) the plaintiff in her statement of claim sought for an obvious order and that was to obtain:

Satu perintah bahawa defendan menyempurnakan satu suratcara pajakan dalam Borang 15A memberikan pajakan kepada plaintif untuk jangkamasa selama 15 tahun seperti yang di nyatakan dalam perjanjian pajakan tersebut.

In my judgment, the plaintiff was certainly entitled to the order which she sought and I have no hesitation in ordering that the order be made in her favour.

Since (P3) has not been registered the written agreement (P1) remains, in law, a good enforceable agreement for a lease. I am fortified in my view by the case of *Margaret Chua v. Ho Swee Kiew & Ors* [1961] 1 MLJ 173 where Thomson CJ speaking for the then Court of Appeal at p. 175 had this to say:

The judge, however, was of the opinion, and again I agree with him, that although the agreement might be a nullity as a lease it could be, and indeed was, a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease.

For that view there is considerable authority.

In the case of *Parker v. Taswell* 2 De G. & J. 559 an instrument which as containing words of present demise was a lease but which not being under seal was void as such by reason of s. 3 of the Real Property Act 1845, (8 & 9 Vict. c. 106) was treated as an agreement for a lease and specific performance was granted. Lord Chelmsford said (at p. 570):

If the legislature had intended to deprive such a document of all efficacy, it would have said that the instrument should be 'void to all intents and purposes.' There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect.

In the case of *Tidey v. Mollett* [1864] 16 CB (NS) 298, 308, Erle CJ referring to leases not under seal, said:

> Although at one period the courts strove to construe these documents to be present demises, yet, since the 8 & 9 Vict. c. 106, for the same reason, the judges will, if they contain words of agreement, construe them to be agreements only, and not demise, – *ut res magis valeat quam pereat.*

Again, in the case of *Martin v. Smith* LR 9 Ex. 50, 52 the court was concerned with an instrument not under seal and Kelly CB said:

> *Parker v. Taswell* has decided that such an agreement, though void as a lease, is good and valid as an agreement, and may be enforced in equity by decree for specific performance.

Later, in the case of *Zimbler v. Abrahams* [1903] 1 KB 577, Stirling LJ said (at p. 582):

> Having regard, however, to the decision of Lord Chelmsford in *Parker v. Taswell*, we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance.

Finally, in the case of *In re Fireproof Doors, Ltd., Umney v. The Company* [1916] 2 Ch. 142, 151 Astbury J applied the same principle to debentures that were invalid as such as not being under seal. He said:

> A lease void at law under the Real Property Act 1845, s. 3, may be used as an agreement: *Parker v. Taswell*; and I see no reason why an irregular debenture should not be treated in the same way.

In another part of his judgment Thomson CJ said in the *Margaret Chua's* case *(supra)*:

> Apart from English authority it has been made clear more than once in jurisdictions where the law provides for registration of title to land that the law relating to transfer of land is distinct from the general law of contract.

In the Johore case of *Alagappa Chetty v. Ng Guan Yin* 5 FMSLR 236 Brown J said with reference to an agreement for the sale of land which could not be registered (at p. 241):

> The correct view of the effect of such a transaction in the Federated Malay States (and therefore in Johore) appears to be that, not being recognized by the law relating to registration of title, it can operate as a contract and may therefore give rise in appropriate circumstances to a decree for specific performance against the proprietor of the land but cannot create anything in the nature of an incumbrance on the land itself.

It is interesting to note that way back in 1956, Thomson J (as he then was) in *Bachan Singh v. Mahinder Kaur & Ors* [1956] 22 MLJ 97 had occasion to say something about the effect of an unregistered transfer of land. This was what his Lordship said:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam.* In other words, he acquires a right to the land as against the vendor personally but not good as against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code ... .

Applying these authorities, it is correct to say that the written agreement (P1) though void at law as a lease because of non-registration as required under s. 221(4) of the NLC, yet it is good as an agreement enforceable in equity. The parties intended that there should be a lease and equity must be invoked to carry that intention into effect effectively. An equitable relief once given to the plaintiff would clothe her with the status of a legal lessee. It is germane to mention that there is s. 206(3) of the NLC which enacts that nothing in sub-s. (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein. In my judgment a liberal application of the equitable relief within the terms of s. 206(3) of the NLC must be construed in favour of the plaintiff. The contractual obligations of the parties under the written agreement (P1) must be given effect. I am reminded of the principle that developed in the case of *Walsh v. Lonsdale* [1882] 21 Ch. D 9 to the effect that an agreement for a lease is said to be as good as a lease if it is capable of specific performance based on sufficient acts of part performance. In *Haji Abdul Rahman v. Mohamed Hassan* [1917] AC 209, the Privy Council was of the view that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while useless as a transfer or burdening instrument, was good as a contract. In *Lin Nyuk Chan v. Wong Sz Tsin* [1964] MLJ 200 the then Federal Court held that failure to comply with the registration provisions of s. 88 of the Sabah Land Ordinance did not render the agreement for a lease invalid and unenforceable. In *Yong Tong Hong v. Siew Soon Wah* [1971] 2 MLJ 105 the then Federal Court held that a non-registration of a 30 year lease was treated as a specifically enforceable agreement for a lease. In *Inter-Continental Mining Co. Sdn Bhd v. Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145 the then Federal Court once again held that a purported sublease not in statutory form was good as an agreement for a sublease and specifically enforced it. One common thread that runs through these cases is this: equity intervened and treated an imperfect lease

as an agreement for a lease provided it is valid and enforceable. In the present case, by the doctrine of equitable intervention the written agreement (P1) would be treated as an agreement for a lease and since it had been partly executed by possession having been taken under it and two buildings have since been built on it, the equitable remedy of specific performance would be an undoubtedly an appropriate remedy. It is germane to mention that the proposition that a grant of specific performance based on an act of part performance must be referrable to an existing contract between the parties can be found in the case of *Steadman v. Steadman* [1974] 2 All ER 977.

Under s. 221(2) of the NLC a lease refers to a letting of land for a term exceeding three years and under s. 227 of the NLC that lease is a registrable interest. I need to re-emphasise that an unregistered lease may take effect as an agreement for a lease which is specifically performable (*Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok* [1977] 1 MLJ 124) but until registration it is not a statutory or "legal" lease under the NLC. Syed Agil Barakbah J in *Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok (supra)* had to consider one of the issues that cropped up and that was in regard to the position of the defendant who relied on a void lease. This was what his Lordship said as seen at p. 125 of the report:

> Now, what is the position of the defendant who relies on a void lease? It is an accepted principle as held in *Margaret Chua'a* case, *supra* that although an agreement might be a nullity as a lease, it could be (and indeed it was in that case) a good enforceable agreement as a lease under which the registered proprietor had undertaken the obligation to grant a lease; it was valid as agreement for a lease enforceable in equity. There are strong authorities both English and local which are discussed in the cases cited above. I will only deal with the relevant one. When will equity come to the aid of the lessee in order that the principle will apply? In this regard Mohamed Azmi J in *Lee Lum Soh's* case, *supra*, having discussed relevant authorities, concluded that a tenant relying on an agreement void as a lease for non-registration can only be protected in equity if he has equitable grounds. Where a person has expended money on the land of another in the expectation of being allowed to remain in occupation, induced and encouraged by the owner of the land, an equity was created such that the court will protect his occupation of the land, and the Court has power to determine in what way the equity so arising could be satisfied (*Inwards & Ors v. Baker* [1965] 2 WLR 212, 213). The money laid out on the land or expended on the land of another means money directed towards physical or structural improvements to the land such as the erection of houses, wharves, jetties, etc (Per Winslow J in *Liew Ah Hock v. Malayan Railway* [1967] 1 MLJ 53, 55).

His Lordship said at p. 126 column G of the judgment, which must surely apply to the written agreement (P1) signed between the plaintiff and the defendant, in the following words:

> The net result of all these authorities points to the conclusion that a contract wherever possible should be construed so that the intention of the parties may be carried out rather than frustrated.

It is interesting to note that *Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok (supra)* also lays down the following attractive proposition which would surely apply to the intervener in the present case. That proposition of law is this: A purchaser (like the intervener) with notice that the vendor (like the defendant) is not in possession of the land takes subject to the right or interest of a tenant in possession (like the plaintiff) notwithstanding the fact that the tenant (like the plaintiff) may have entered into an unregistered lease. His Lordship Syed Agil Barakbah J (as he then was) aptly described it in this way:

> It is the duty of the purchaser who has notice that the vendor is not in possession of the property to make inquiries from the tenant in possession and find out from him what his rights are. If he does not choose to do that then whatever title he acquires as purchaser will be subject to the title or right of the tenant in possession (per Vaughan Williams LJ in *Hunt v. Luck* [1902] 1 Ch. 428, 433) ...

There was evidence that when Harun visited the land at Pulau Sibu before the intervener signed the sale and purchase agreement, he saw buildings on the land and this was what he said in examination-in-chief:

> Sebelum Anim bte Abdul Aziz menandatangani perjanjian-perjanjian tersebut, saya pernah meninjau tanah-tanah tersebut. Saya buat tinjauan ini bersama Encik Fong Yuen Hoe I/C no: 1165071 (dicamkan).

No reason was advanced as to why Encik Fong Yuen Hoe accompanied Harun to visit the land. To a question by the Court Syed Shaikh explained that lately he came to know that the intervener was the purchaser. Earlier on he heard, through rumours, that the purchaser was Aseania. Was this another Ali Baba venture bearing in mind that the land titles to the three pieces of land were categorised as Malay reserves? Harun continued in these words under examination-in-chief:

> Semasa saya meninjau tanah itu dan bila saya berdiri membelakangi pantai ada beberapa buah bangunan yang berbentuk chalet di sebelah kanan dan di sebelah kiri terdapat satu bangunan.

Sekali imbas saya fikir bangunan-bangunan ini terletak di Lot bersebelahan dan bukan di atas Lot kepunyaan pencelah.

Bangunan sebelah kiri pun tidak terletak di atas Lot kepunyaan pencelah.

Under cross-examination, Harun testified to the following effect:

Tinjauan ke Pulau Sibu memang telah di buat oleh saya. Saya nampak bangunan-bangunan yang bersebelahan daripada tanah kepunyaan pencelah. Ini merupakan anggapan saya sahaja.

Saya tanya tuan tanah iaitu Mahmood bin Omar sama ada, ada bangunan di tanah Mahmood dan beliau kata ada dua bangunan sahaja. Mahmood kata Salimah diri rumah itu secara menumpang sahaja dan bila Mahmood hendak jual tanah dia, rumah itu akan di beri balik kepada Salimah.

Saya tidak tahu berkenaan pajakan di antara Salimah dengan Mahmood di atas tanah tersebut. (P1) di tunjuk kepada saksi dan saksi kata: Saya tidak tahu berkenaan (P1).

It was put to Harun the following salient points in the plaintiff's case:

Put: Mengikut (P1) Salimah memajak 21/48 bahgian LO 67, LO 68 dan LO 69 untuk 15 tahun mulai 20 November 1990 dengan bayaran RM1,800 setahun.

Jawapan: Saya tidak tahu.

Put: Mengikut Salimah (SP1) dan Syed Shaikh (SP2) wang RM1,800 pun telah diberi kepada defendan selepas defendan menandatangani (P1).

Jawapan: Saya tidak tahu.

Soalan: Awak tahu tak bahawa defendan dan Syed Shaikh telah kenal di antara satu dengan lain sekian lama dan mereka adalah kawan baik dan percaya di antara satu sama lain?

Jawapan: Saya tidak tahu.

Put: Mahmood memang tahu berkenaan (P1) dan dia telah memajak tanah arwah bapanya kepada Salimah.

Jawapan: Tidak tahu.

Put: Selepas (P1) di tandatangani baru 2 buah pondok seperti di gambar P4A ke P4I di dirikan oleh Syed Shaikh.

Jawapan: Tidak tahu.

Put: Kevet di masukkan berpandukan (P1).

Jawapan: Tidak tahu.

The defendant was quite bold and truthful when he was being cross-examined. When shown the plan in (P7) that was drawn up by Abdul Shukor bin Sharif (SP3 – "Shukor") he categorically stated that a building stood at LO 69 and another building stood at Lot 156 (it refers to LO 67 as shown in exh. PP11). Shukor too testified that a detailed plan as per (P8) was an exact replica of the plan in (P7). Shukor's plan in (P7) may not be a perfect plan but it did show the boundary wherein the two buildings stood. Shukor too confirmed that the photographs in P4A to P4I depicted the two buildings found on the defendant's land. The sum total of Shukor's evidence strengthened the plaintiff's case to the effect that the portions leased to the plaintiff had been occupied and currently two buildings had been built thereon.

Finally, a damning piece of evidence surfaced when Harun was cross-examined. It was this:

> Saya tahu Salimah masukkan caveat dan saya tanya Mahmood bin Omar dan mengikut Mahmood dia ada sign satu perjanjian pajakan dengan Salimah.

Concisely put Harun knew that there were two buildings being built on the defendant's land by the plaintiff. He also knew that the defendant signed a lease agreement with the plaintiff. Applying *Ong Heng Hua Realty Sdn Bhd v. Teoh Chai Siok (supra)*, it can be said that the intervener had notice that the vendor defendant was not in possession of the land and that since the lessee plaintiff built two buildings on the land she can be said to be a tenant in possession even though she had entered into an unregistered lease with the defendant. This must surely be the effect of an unregistered lease on a third party like the intervener in the present case. This brings me to the principle of law distilled from the case of *Lee Ah Low v. Cheong Lep Keen & Anor* [1970] 1 MLJ 7 where the then Federal Court laid down the effect of an entry unto a piece of land by a lessee in regard to an unregistered lease. That principle of law can be concisely stated as follows: An entry by a lessee under an unregistered lease will create a legal relationship of landlord and tenant, establishing a tenancy at will. Such a tenancy can be converted, upon payment of the rent reserved, into a periodic tenancy, whether a yearly, monthly or weekly tenancy, depending on the mode of payment of the rent.

The sum total of all these authorities show that the plaintiff here certainly has a remedy against the defendant. A court of equity will strain its power to enforce full performance of the written agreement (P1) in favour of the plaintiff. Equity certainly has a role to play under the NLC. A few cases will illustrate the point. In *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 2 MLJ 105; [1973] 1 MLJ 133, HT Ong CJ speaking for the then Federal Court said:

> Here it seems to me that no strain will be imposed upon the powers of this court to give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. Section 221(3)(b) of the National Land Code provides that the maximum term for a lease of a part only of alienated land shall be 30 years. The law permits no longer term and this court should grant the appellant no less.
>
> Although the agreement was not a proper instrument for registration as a lease the authorities are clear that it may be treated as an agreement for a lease. The validity of contracts relating to alienated land or any interest therein is explicitly declared in s. 206(3) of the National Land Code.

In *Bank Negara Indonesia v. Philip Hoalim* [1973] 2 MLJ 3, the Privy Council held the view that in spite of the fact that the defendant was not a protected tenant under the Rent Acts, he had an equity to remain "so long as he continued to practise his profession."

Way back in 1951, in the case of *Wilkins v. Kannammal* [1951] MLJ 99 Taylor J observed that:

> The Torrens law is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects.

Gill FJ in *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116 said:

> That such equitable estates and rights are recognized under the Torrens system of registration of titles to land is not open to question.

Ajaib Singh J in *Woo Yok Wan v. Loo Pek Chee* [1975] 1 MLJ 156 observed:

> What is precluded by s. 6 of the Civil Law Ordinance, 1956 is the English law relating to tenure or conveyance or assurance of or succession to any immovable property ... but the section does not in any way preclude the application of the English principles relating to equitable interests in land.

Equity would be invoked without the need to depend on the existence of an agreement but if there is a written agreement (P1) just like the present case equity would certainly be invoked vigorously. In my judgment, from a long line of authorities, words or conduct would suffice to raise an equity: *Ramsden v. Dyson* [1866] LR 1 HL 129; *Birmingham and District Land Co. v. London and North Western Railway* [1888] 40 Ch. D 268; *Plimmer v. Wellington Corporation* [1884] 9 App. Cas. 699; *Inwards v. Baker* [1965] 2 QB 29 and *Ives (E.R) Investments Ltd v. High* [1967] 1 All ER 504.

The proposition of law that arises in the present case is this. A registered co-proprietor of an alienated land which is undivided may grant by way of a written agreement a lease of his own undivided share thereto for a period of 15 years to a lessee by an instrument in Form 15A and there shall be attached to the instrument a plan and description sufficient to enable the co-proprietor's undivided share to the alienated land to be accurately identified. The facts in the present case were unique. The defendant, Ibrahim and Wok at the material time held the three lots on proportions as specified in the memorial of registration (see s. 343(1)(a) of the NLC). All three seemed to work in tandem agreeing which particular part of the undivided share should go to the defendant. There was evidence that Ibrahim and Wok knew that the two buildings as seen in photographs P4A to P4I were built on the defendant's share notwithstanding the fact that an instrument in Form 15A had not been signed by the defendant. There was also evidence that Syed Shaikh attempted to draw up lease agreements with Ibrahim and Wok but they refused to sign and consequently Syed Shaikh had no choice but to leave the matter as they were. There was also evidence that the rentals for the lease were paid by Syed Shaikh to the defendant and at times even to Ibrahim as reflected in exhibit D2. Wok too, according to Syed Shaikh, received a fair share of the rental. The defendant admitted under cross-examination that the plan in P7 showed the boundary where the two buildings stood. Ideally when one of the co-proprietors of an alienated land wishes to lease his share to a third party the following steps should be undertaken:

(1) All the co-proprietors should agree in writing (consent and concur) to the idea of leasing by one of the co-proprietors. Being an undivided share, all the co-proprietors must also agree to the relevant portion that should go to them individually according to the proportion as specified in the memorial of registration. This is a crucial factor. The plan and description sufficient to enable each of the part belonging to the respective co-proprietors should be accurately agreed upon and identified by the co-proprietors respectively. It is germane to mention that the word "proprietor" that appears in s. 221(1) of the NLC must necessarily include "co-proprietors" for the simple reason that an alienated land can be held by a proprietor or by two or more persons or bodies in undivided shares. Thus, a proprietor or co-proprietors of any alienated land may grant leases of the whole or any part thereof. So long as the co-proprietorship continues and all the co-proprietors do not propose to lease their shares then each shall be entitled to possession and enjoyment of the whole (s. 343(1)(b) of the NLC).

(2) A written agreement to create a valid lease between the lessor and the lessee must contain three essential elements, namely, certainty as to the term of the agreement (15 years like the present case), exclusive possession granted, and the payment of rent (RM1,800 per year like the present case). Latitude must always be given to s. 206(3) of the NLC and in this connection it is right to say that so long as the contract is supported by consideration and later a breach occurs, the injured party may seek damages at law or for that matter the equitable remedy of a specific performance.

(3) The co-proprietor who wishes to lease his identified portion must do so by complying with s. 221 (4) of the NLC. It is a simple process of filling Form 15A and attaching thereto a plan and description sufficient to enable that part belonging to the co-proprietor to be accurately identified. In other words, under the Torrens system the lease must be registered in order to create a legal interest thereto. The rights and remedies of the lessor and lessee under a Torrens registered lease are identical to that of the English general law as can be seen in *Travinto Nominees Pty Ltd v. Vlattas* [1973] 47 ALJR 279 and *Oertel v. Hordern* [1902] 2 SR (NSW) (Eq) 37.

In the event the lease is not registered in accordance with the NLC it does not have the effect of vesting an interest in the lessee. However, although it is void as a lease, applying English equitable principles (*Parker v. Taswell (supra)*; and *Walsh v. Longsdale (supra)*), it is good and valid as an agreement for a lease and is enforceable by a decree for specific performance (*Margaret Chua v. Ho Swee Kiew & Ors (supra)*; and *Siew Soon Wah & Ors v. Yong Tong Hong* [1973] 1 MLJ 133). A third party who purchases the land of a co-proprietor with notice that the co-proprietor is not in possession of the land takes subject to the right or interest of a tenant in posession notwithstanding the fact that the tenant may have entered under an unregistered lease. It is a correct statement of the law and I so say that where the lessee under an agreement for a lease or an unregistered lease like the present case has gone into possession and paid rent to the lessor on the authority of *Lee Ah Kow v. Cheong Lep Keen & Anor* [1970] 1 MLJ 7 the lessee is deemed to hold as a yearly or other periodic tenant, depending on the period with reference to which the rent payable is calculated. *Lee Ah Kow v. Cheong Lep Keen & Anor (supra)* also establishes the proposition that an entry by a lessee under an agreement for a lease or an unregistered lease will create a legal relationship of landlord and tenant, establishing a tenancy at will.

The position of the plaintiff can best be summed up in the words of Gopal Sri Ram JCA in the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 CLJ 713 especially at p. 742:

> Reverting to the observation I made earlier in this judgment, an agreement to grant a lease confers upon the grantee a right *in personam* which he may enforce against the grantor and all his successors in title save a *bona fide* purchaser for value who obtains his title without notice of the agreement. See s. 26(b) of the Specific Relief Act 1950; *Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224.
>
> If the court should decide in the grantee's favour, then, in addition to or in lieu of decreeing specific relief, it may exercise its jurisdiction under s. 417(1) of the Code and grant relief *in rem* by directing rectification of the register document of title to reflect the lease. This is precisely what was done in *Othman & Anor v. Mek* [1972] 2 MLJ 158, although that was a case of a sale, not a lease. The grant of specific relief in such circumstances does no violence to the language or intention of s. 340(1) of the Code. Neither is there any erosion of the *in rem* action conferred by sub-s. (2) of that section. By succeeding in an *in personam* action, a plaintiff gets the registered proprietor to defeat his own title: *Oh Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159.

The intervener knew of the existence of the private caveats lodged by the plaintiff on the three lots restricting, of course, to her shares thereto. Infected with this knowledge, the intervener cannot be said to be a *bona fide* purchaser for value. Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 said at p. 641 of the headnote, which must surely apply to the present case:

> It is settled law that one is not a *bona fide* purchaser until all money has been paid under the contract of sale and that one who only pays the deposit is not a *bona fide* purchaser. When the second caveat was entered, the intervener was not a *bona fide* purchaser of the lands in question. The question then arises as to whether he could become a *bona fide* purchaser by its mere removal, after he had acquired knowledge of its contents. As a matter of law, once a man's mind has become infected with knowledge of an adverse claim or a doubt or cloud upon the vendor's right to convey title before he has paid his money in full, he remains what was at the earlier stage: a person who is not a *bona fide* purchaser.

When the intervener knew of the existence of the private caveats her mind must have been clouded with doubts as to the defendant's right to convey title to her – more so when the intervener has yet to pay the full sum of the purchase price to the defendant. Harun had this to say in examination-in-chief in regard to the balance of the purchase price:

> Di antara perjanjian di antara Mahmood bin Omar dengan pencelah (PP13) harganya ialah RM90,000. Deposit yang dibayar kepada Mahmood bin Omar ialah RM18,000 bagi ketiga-tiga lot. Baki nya perlu dibayar oleh pencelah dalam masa 12 bulan. Baki ini belum dibayar. Pihak pencelah ingin buat bayaran ke atas tanah itu tetapi semakan di Pejabat Tanah menunjukkan caveat yang di masukkan oleh Wan Salimah. Saya tidak tahu bila caveat Wan Salimah di masukkan tetapi caveat ini saya pasti di masukkan selepas caveat pencelah di masukkan.

Exhibit (P3) when read with s. 221(4) of the NLC should have been accompanied by a plan and description sufficient to enable the part to be leased to be accurately identified. But this was not the case. It is pertinent that that part of the land to be leased to be accurately identified for the reason, in the context of the present case, that there were other co-proprietors. Section 342(1) of the NLC defines "co-proprietorship" to mean "the holding of alienated land by two or more persons or bodies in undivided shares." Section 342(2) of the NLC enacts that:

> All alienated land vested in two or more persons or bodies shall be held by them as co-proprietors unless, pursuant to s. 344 or 346, or the corresponding provisions of any previous land law, they are registered as trustees or representatives.

Section 343(1)(a) of the NLC enacts that where any land is vested in two or more persons or bodies as co-proprietors their shares therein shall be deemed to be equal unless different proportions are specified in the memorial of registration. In the present case, the memorials of registration for the three lots have been proportioned not on equal basis. It is therefore germane to set out the details of the memorials of registration for these three lots.

For LO 67 as seen in exh. PP11, the original registered proprietor was Omar bin Kundor. After the death of Omar bin Kundor, LO 67 was transmitted and registered on 22 December 1981 to three persons, namely:

(a) Mahmood bin Omar – 21/48 share.

(b) Ibrahim bin Omar – 21/48 share.

(c) Wok bte Ali – 6/48 share.

After the death of Wok bte Ali, her share was registered in the name of Ismail bin Hussin on 13 October 1992. Finally, on 2 September 1994 Ismail bin Hussin's share of 6/48 was transferred to the intervener. On the same date also (2 September 1994) Ibrahim bin Omar's 21/48 share was registered in the name of the intervener. The 21/48 share of Mahmood bin Omar still remained in his name and it is this share that the intervener now sought to

be transferred to her on the strength of the purported sale and purchase agreement. Unfortunately, the sale and purchase agreement in relation to the sale of LO 67 between Mahmood bin Omar and the intervener was not exhibited at all.

For LO 68 as reflected in exh. PP10, all the particulars stated there were the same as that found in LO 67. Mahmood bin Omar's 21/48 share in LO 68 still remained in his name and constituted the subject matter of the present action. The intervener claimed that she had a right to Mahmood bin Omar's 21/48 share in LO 68 on the strength of a sale and purchase agreement (PP13) entered between the intervener and Mahmood bin Omar on 22 January 1992.

In regard to LO 69 as shown in exh. PP12, the details recorded therein were the same as that in LO 67. Mahmood bin Omar's 21/48 share still remained in his name and the intervener sought for her right over it on the strength of a purported sale and purchase agreement which was not tendered as an exhibit.

Though the land titles in exhs. PP10, PP11 and PP12 did not show the presence of private caveats entered by the plaintiff, yet the intervener through Harun admitted the existence of those private caveats. Indeed all parties proceeded on the premise that private caveats were lodged by the plaintiff on LO 67, LO 68 and LO 69. Harun testified that the intervener too lodged private caveats on LO 67, LO 68 and LO 69, and this must be in relation to Mahmood bin Omar's shares – the defendant in the present case.

The land title for LO 70 as tendered by the plaintiff in exh. (P6) showed the registered proprietor as Haji Mohamed Noor bin Hj Bahari who charged the land to the Bank of Commerce (M) Berhad on 21 July 1992. LO 70 has no bearing to the present case at all.

Reverting back to the issue of *non est factum*, the sale and purchase agreement entered between the defendant and the intervener dated 22 January 1992 and marked as exh. PP13 in relation to LO 68 was prepared in Bahasa Malaysia and the words employed therein in rumi script were far more sophisticated than the written agreement (P1). Nothing was said about the defendant's inability to read and understand exh. PP13. In my judgment, if the defendant could manage well with exh. PP13 he too could, with ease, be comfortable with the words employed in the written agreement (P1). Just like the written agreement (P1), the defendant's signature on exh. PP13 was in rumi script and not in the jawi script notwithstanding the fact that the defendant was educated in a religious school. The defendant was certainly capable of signing legibly on these documents and he cannot be placed in the same category like those people who could merely thumbprint documents presented to them. As I said earlier the defendant was an intelligent man.

The Power Of Attorney

In simple language where the donor of the power wishes to formally authorize the donee of the power to act as his agent, the donor may effect an instrument known as the power of attorney to appoint the donee as his attorney under power. Put in another way, it is correct to say that the instrument conferring authority by deed is termed a power of attorney. The English courts have construed strictly, according to well – recognised rules, the power of attorney, vested by the donor to the donee as reflected in *Bryant, Powis and Bryant, Ltd v. La Banque du Peuple* [1893] AC 170, 177; 1 Digest 303, 281; *Howard v. Baillie* [1796] 2 Hy B1 618; 1 Digest 295, 231; and *Withington v. Herring* [1829] 5 Bing 442; 1 Digest 302, 277. An instrument to create a power of attorney is set out in s. 3(1)(a) of the Powers of Attorney Act 1949 (Revised 1990) which enacts that:

> 3(1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within West Malaysia unless -
>
> (a) if executed within West Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by -
>
> (i) a Magistrate; or
>
> (ii) a Justice of the Peace; or
>
> (iii) a Land Administrator; or
>
> (iv) a Notary Public; or
>
> (v) a Commissioner for Oaths; or
>
> (vi) a advocate and solicitor; or
>
> (vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in West Malaysia and incorporated by or under any written law in force in West Malaysia; or.

It is apparent that the validity of a power of attorney is dependent on its execution before certain named personalities and it must be authenticated in the appropriate form following what has been set out in the First Schedule thereto. A power of attorney created in some other way other than what is stated in s. 3(1)(a) of the Powers of Attorney Act 1949 (Revised 1990) must be struck down as null and void and of no effect. Thus, where a power of attorney is designed for purposes of dealings in land that power to be valid must be executed and authenticated pursuant to s. 3(1)(a) of the Powers of

Attorney Act 1949 (Revised 1990). The validity of an instrument creating a power of attorney will take effect once a true copy of the said instrument duly compared therewith and marked by the Senior Assistant Registrar with the words "true copy" has been deposited in the office of the Senior Assistant Registrar (s. 4(1)(a) of the Powers of Attorney Act 1949 (Revised 1990)). When the donee of the power of attorney deals with alienated land, he must deposit with the Registrar of Titles an office copy of the copy deposited in the High Court Registry. It is the Senior Assistant Registrar who is responsible for marking the document as a certified copy and when so marked that document shall become and be an office copy of such document (s. 10 of the Powers of Attorney Act 1949 (Revised 1990)). The Registrar of Titles will retain that office copy and will be referred to by him in any subsequent dealing by the attorney qua attorney. A power of attorney is a powerful document; its validity will continue in force indefinitely unless it is (see s. 5 of the Powers of Attorney Act 1949 (Revised 1990)):

(i) Revoked or renounced. Revocation will take place by way of a notice in writing of the donor's revocation or of the donee's renunciation and these have been deposited in every office in which the appointment was required to be deposited.

(ii) Extinguished by the death of the donor or the donee, the bankruptcy of the donor, or the donee has become inflicted with unsoundness of mind or the donor has been adjudged to be of unsound mind.

It is of utmost importance that in construing a power of attorney that regard should be had to the recitals which would show the general object and control of the general terms as an operative part of the deed (*Rooke v. Kensington (Lord)* [1856] 2 K. & J. 753, 769; 17 Digest 367, 1787; and *Danby v. Coutts & Co.* [1885] 29 Ch. D. 500; 1 Digest 297, 247). The general words found in the power of attorney must be construed as having reference only to the special powers (*Attwood v. Munnings* [1827] 7 B. & C. 278; 1 Digest 295, 232; *Perry v. Holl* [1860] 2 De G.F. & J. 38, 48; 1 Digest 302, 279 and *Lewis v. Ramsdale* [1886] 55 LT 179; 1 Digest 297, 251). Incidental powers necessary to carry out the object of the power of attorney would also be vested to the donee like what was found in the case of *Re Wallace, Exp. Wallace* [1884] 14 QBD 22; 1 Digest 298, 258 where a solicitor who was authorized to conduct legal proceedings was said to be justified in presenting a bankruptcy petition but nevertheless was said not to be justified in assenting to the execution by the defendant of a deed of assignment for the benefit of his creditors. It is interesting to note that a power granted to the donee to manage certain property, followed by general words giving the donee full power to do all lawful acts relating to the donor's business and affairs of whatever

nature does not necessarily include an authority to indorse bills for the simple reason that the general words are construed as having reference to managing the donor's property and that indorsing the bills may not be incidental thereto (*Esdaile v. La Nauze* [1835] 1 Y. & C. Ex. 394, 1 Digest 301, 269; *Lewis v. Ramsdale (supra)* and for comparison reference may be made to *Harper v. Godsell* [1870] LR 5 QB 422 where general words were said to be limited to an exercise of privileges under a partnership). A power of attorney to complete all contracts which the donee may deem necessary for a particular specific object, must necessarily include an authority to obtain money for payment in respect of such contracts, where the payment is necessary and incidental to the completion of the whole contract (*Withington v. Herring* [1829] 5 Bing 442 per Park J at p. 459). All the authorities show that the powers vested to a donee under a power of attorney must be adhered to strictly. Any authority exercised in excess of and outside the reasonable scope of its special powers would deprive a third party from holding the principal liable: *Jacobs v. Morris* [1902] 1 Ch. 816 CA.

So much for the law on the power of attorney. Now to the evidence. The interevener did not attend the trial. She saw it fit not to attend the trial and the notes of evidence bore out this fact. On one occasion the notes of evidence contained a recital that the intervener did not attend but she was represented by Harun. The intervener did not give evidence at all. It was Harun that took the stand in lieu of the intervener. Harun testified that he was authorized by the intervener to give evidence in regard to these proceedings on the strength of a power of attorney that had been registered in the High Court at Kuala Lumpur and deposited at the land office in Mersing, Johor. Harun re-emphasised the point that the intervener was his sister-in-law. A document dated 4 January 1992 was marked as exh. PP9 and that document was said to be the power of attorney. Exhibit PP9 was worded thus:

Tarikh: 4hb Jan1992

KEPADA SESIAPA YANG BERKENAAN

Adalah dimaklumkan bahawa saya melantik Encik Harun B. Faudzar (K/P: 8370900) sebagai wakil saya dan saya memberi kuasa penuh kepada beliau untuk bertindak bagi pihak saya dalam kesemua perkara-perkara berkaitan dengan pembelian tanah-tanah di pulau di dalam Negeri Johor.

En. Harun adalah diberi kuasa oleh saya untuk berunding dengan sesiapa juga tuanpunya tanah mengenai harga jualan dan lain-lain syarat pembelian tanah bagi pihak saya. Disini saya mengesahkan bahawa saya memastikan dan meratifikan kesemua tindakan atau penjanjian yang dibuat oleh En. Harun adalah dipersetujui oleh saya.

Yang benar,

(t.t.)

ANIM BT. ABDUL AZIZ
(K/P: A0354421)

Anyone reading exhibit PP9 will come to the conclusion that that document was not meant and can never be a power of attorney as it went against the provisions of the Powers of Attorney Act 1949 (Revised 1990). Exhibit PP9 was drafted not in accordance with the format as set out in the First Schedule to the Powers of Attorney Act 1949 (Revised 1990) and, consequently, when Harun testified that the power of attorney had been registered in the High Court at Kuala Lumpur and deposited in the land office at Mersing, Johor he must have referred to no other document other than exh. PP9. But alas, exh. PP9 had no legal trappings of a valid power of attorney. To be valid exh. PP9 must strictly comply with ss. 4 and 5 of the Powers of Attorney Act 1949 (Revised 1990) and it must be deposited with the Registrar of Titles in strict compliance with ss. 309, 310 and 311 of the NLC. In my judgment, exh. PP9 is null and void and of no effect at all. Without a valid power of attorney, this court was left guessing as to the scope of powers under which Harun was empowered to act. This court too was certainly not well advised as to the recitals of the power of attorney by which Harun's operative role would be emphasised and entrenched. The sea of conjecture is an unchartered area which this court would not be willing to travel aimlessly and endlessly. That being the case, Harun was not empowered to give evidence on behalf of the intervener and he too could not transact any business to purchase that land from the defendant on behalf of the intervener. These were my findings and they formed part and parcel of this judgment. Be that as it may, I considered Harun's evidence in its entirety to come to a just and equitable decision. What then would be the legal position of the intervener? She must have been advised by her solicitors not to attend court proceedings and not to give evidence. These must be the irresistible conclusions that one can arrive at looking in perspective the facts of the whole case. She took a dangerous course of action at her own peril. What was more vexing was the fact that the land titles to LO 67, LO 68 and LO 69 were all registered in the intervener's name except the shares of the defendant to these lots. There must be reasons as to why the intervener refused to attend court proceedings and ignored the necessity of giving evidence. *Omnia praesumuntur contra spoliatorem* would be vigorously applied against the intervener. If someone withholds evidence, every presumption to his disadvantage will be adopted. (*Williamson v. Rover Cycle* [1901] 2 IR 619). The Judicial Committee observed in the case of *Durga v. Mathura* 15 CWN 717, 721-22 10 IC 963 PC:

> ... Under such circumstances it is impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness-box. It raises a presumption against them.

It is the duty of the intervener who must have known the whole circumstances to come to court and give evidence and at the same time submit to cross-examination. Her non-appearance is the strongest possible circumstance to discredit the truth of her case (*Gurbakhsh v. Gurdial A.* [1927] PC 230).

For these reasons, I gave judgment to the plaintiff and made the following orders:

> (1) Defendan di perintahkan menyempurnakan satu surat cara pajakan dalam satu instrument atas Borang 15A memberi pajakan kepada plaintif untuk jangka masa selama 15 tahun mulai 28 November 1990 berkenaan 21/48 bahgian kepunyaan defendan di atas LO 67 (H.S.M. 45), LO 68 (H.S.M. 44) dan LO 69 (H.S.M. 46) mengikut surat perjanjian bertarikh 28 November 1990 yang dibuat di antara plaintif dengan defendan yang telah di setemkan pada 17.10.1991. Borang 15A hendaklah disertakan dengan satu pelan dan huraian yang mencukupi untuk membolehkan bahgian itu di tentukan dengan tepat nya.
>
> (2) Jika defendan gagal berbuat demikian dalam tempoh sebulan daripada tarikh perintah ini Penolong Kanan Pendaftar, Mahkamah Tinggi No: 2 akan menyempurnakan surat cara pajakan dalam Borang 15A bagi pihak defendan.
>
> (3) Di bawah s. 417(1) Kanun Tanah Negara, Pentadbir Tanah Daerah, Mersing selepas menerima satu instrument dalam Borang 15A yang telah disempurnakan oleh plaintif dan defendan atau oleh plaintif dan Penolong Kanan Pendaftar, Mahkamah Tinggi No: 2 bagi pihak defendan, diarahkan untuk membetulkan geran tanah terhadap LO 67 (H.S.M. 44), LO 68 (H.S.M. 45) dan LO 69 (H.S.M. 46) bagi menentukan lis 15 tahun ini berkenaan 21/48 bahgian kepunyaan defendan. Satu instrument dalam Borang 15A itu hendaklah disertakan dengan satu pelan dan huraian yang mencukupi untuk membolehkan bahgian itu ditentukan.
>
> (4) Kos kepada plaintif dibayar oleh defendan dan pencelah.

Reported by Anne Soh